



**State of New Hampshire**  
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

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State Employees Association of New Hampshire,  
Local 1984, SEIU

Complainant

v.

State of NH Department of Corrections

Respondent

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Case No. S-0376-13

Decision No. 2005-011

APPEARANCES

Representing the SEA, SEIU Local 1984:

Lorri Hayes, Esquire, Contract and Field Operations Administrator

Representing the State of NH Department of Corrections:

John Vinson, Esquire, Legal Counsel

BACKGROUND

The State Employee's Association, SEIU Local 1984, AFL-CIO (hereinafter the "Union") filed an unfair labor practice complaint on October 31, 2003 alleging that the State of New Hampshire, Department of Corrections (hereinafter the "Department" or "State") has committed unfair labor practices by continuously violating certain articles contained in the parties' collective bargaining agreement ("CBA"). Specifically, the Union claims that the State has repeatedly failed to comply with the contractual provisions relating to vacancies and transfers, Articles 27.16 and 27.17 of the CBA, respectively, and therefore committed violations of RSA 273-A:5 I (e), (g), and (h).

The Union asserts that pursuant to contract the State is required to post all vacancy and lateral transfer announcements and to select employees for said vacancies and transfers on the basis of seniority. Additionally, in the event that the most senior employee is found not to be the

best qualified, the Union contends, then she or he must be provided a documented performance based reason for non-selection. The Union alleges, inter alia, that in October 2003 the Department required employees to submit to an interview prior to being considered for a vacancy, and therefore violated the requirement under Article 27.17 that establishes the only standard of review as being seniority. It also cites further instances in which the Department has allegedly failed to make proper postings of vacancies and/or transfers, and otherwise violated Articles 27.16 and 27.17 of the CBA.

The Union points out that the Department has been engaged in sub-unit negotiations with the Union for some time, during which it has made proposals to alter the contract articles in question. The Union argues that such conduct is reflective of the Department's recognition that it has no right to interview and no right to place rotational employees in positions without providing other employees an opportunity to bid on the positions first. As remedies, the Union requests, among other things, that the PELRB order the State to (1) cease and desist in its violation of RSA 273-A:5 and the parties' CBA, (2) fill all vacancies cited in the instant charge in accordance with the CBA, and (3) reimburse the Union for all of its costs in pursuing this action, including the fair market value for attorney's fees.

The State filed its answer denying the Union's charge on November 14, 2003. It asserts, inter alia, that it has not violated either the contract or statute and that the Union is attempting to encroach on its managerial rights. First, as a preliminary matter, it claims that the Union's allegation relating to an incident that occurred in June 2002 is over 6 months old and should be dismissed as untimely.<sup>1</sup> As to the merits of the Union's complaint, the State makes several affirmative arguments. It asserts that the CBA does not specify that an interview process is forbidden and that since it has retained the management rights specified under Article 2.1 of the CBA, it can use a process for determining who is best qualified for an assignment. As to its alleged failure to make postings, it answers that there was no requirement that the assignments at issue be posted because there were no "vacancies" within the meaning of the law. In this context, it requests that the Board adopt the definitions of "transfer" and "vacancy" as set forth in the Administrative Rules of the Division of Personnel.

Moreover, the State insists, contrary to the Union's assertions, that there is no requirement within the CBA that a performance based reason for non-selection to a vacancy be "documented." While the State admits that it has been negotiating for many months with the Union over the reassignment issue, it argues that this fact does not mean that the State acknowledges anything except for a willingness on its part to negotiate. Accordingly, it requests that the Union's unfair labor practice charge be dismissed. The State filed a supplemental answer on October 26, 2004.

A hearing was convened before the Public Employee Labor Relations Board ("PELRB" or "Board") in Concord, New Hampshire on November 9, 2004. Both parties were represented by counsel at the hearing, and had the opportunity to present witnesses for examination, to

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<sup>1</sup> During the course of the pre-hearing conference, the Union's representative offered the clarification that the Union was not seeking any relief regarding said allegation but had included the facts in the complaint for purposes of showing history and pattern of conduct by the Employer. In response, the Employer's representative indicated a desire to reserve all arguments on the issue of timeliness.

undertake cross-examination, and to offer exhibits into evidence. At the outset of the hearing, the Board heard arguments on the State's statute of limitations claim and the Union's motion to strike the State's supplemental answer, both of which the Board took under advisement. At the conclusion of the hearing, the Board afforded the parties an opportunity to file post-hearing memorandums of law. Following receipt of such memorandums from both parties on December 1, 2004, the record was closed. Upon review of all filings submitted by the parties and a consideration of all relevant evidence, including the parties' "Mutual Statement of Agreed Facts" incorporated as Findings of Fact paragraphs 8 through 15 below, the Board determines the following:

#### FINDINGS OF FACT

1. The State of New Hampshire, through its Department of Corrections, employs personnel in various positions and is determined to be a "public employer" within the meaning of RSA 273-A:1 X.
2. The State Employees' Association of New Hampshire, SEIU Local 1984, is the duly certified exclusive representative for certain classified employees within the Department of Corrections.
3. The State and the Union are parties to an existing collective bargaining agreement (CBA) for the period July 1, 2002 to June 30, 2003. (Joint Exhibit No. 2).
4. Article 27.16 of the parties' CBA provides:

Vacancies: The Employer shall post all vacancies throughout the bargaining unit. All postings shall identify the vacancy's assignment, location, shift, and days off if they are known.

5. Article 27.17 of the parties' CBA provides:

Transfers: All lateral transfers shall be posted by the Employer for not less than five (5) work days. Selection of employees for transfer shall be from responses to the posting and shall be made on the basis of seniority within the Department of Corrections. In the event that the most senior employee is not selected, specific performance based reasons for the non-selection of all senior employees passed over shall be made in writing to such employee(s) by the person making the selection. This written notice to employees not selected, including the reasons for non-selection, shall be completed within ten (10) workdays.

In determining "seniority within the Department of Corrections", full credit for service shall be given to employees in the Secure Psychiatric Unit (SPU) who were moved into the Department of Corrections by the statutory reorganization which moved the SPU from the Department of Health and Human Services to the Department of Corrections.

27.17.1. The Employer shall provide three (3) months written notice to any unit employee who is to be transferred involuntarily to a location fifty (50) miles or more from Concord.

27.17.2. Temporary Reassignment: The Employer may temporarily reassign an employee(s) at the employee's request. Temporary reassignments shall be for a sixty (60) day period unless the Employer and the employee agree to extend the time limit. At the conclusion of the time limit, the employee shall return to his/her previous assignment.

6. Article XIV of the parties' CBA sets forth the parties' grievance procedure. Article 14.1 describes the purpose of the article as being "...to provide a mutually acceptable procedure for adjusting grievances and disputes arising with respect to interpretation or application of any provision of this Agreement."

7. Article 14.5 establishes arbitration as the final step of the parties' contractual grievance procedure. It provides, among other things, that:

To the extent that a matter is properly before an arbitrator in accordance with this provision, the arbitrator's decision thereon shall be final and binding providing it is not contrary to existing law or regulation nor requires an appropriation of additional funds, in either of which case it will be advisory in nature.

The Parties further agree that questions of arbitrability are proper issues for the arbitrator to decide.

8. The Union proposed the language concerning CBA articles 27.16 and 27.17 during the Subunit negotiations in 1997. The language was agreed to and became a part of the contract in 1997.
9. The Department representative, Mr. Nicholas Pishon agreed to the language as proposed by the Union.
10. The Union's Chief Negotiator was Mr. Thomas Hardiman and the Department's Chief Negotiator was Mr. Nicholas Pishon. Mr. Hardiman was assisted during the negotiations by Mr. Randy Hunneyman and Mr. Paul Cascio, the drafters of the language in question.
11. The Department has posted vacancy announcements that require interviews.
12. The Department and the Union have discussed the lateral transfer language on many occasions including the Labor Management Committee meetings held in 2002 and 2003.
13. At the time that this Improper Practice Charge was filed, Mr. Gary Smith was President, Department of Corrections Chapter 24 and Mr. Phillip Stanley was the

Commissioner, Department of Corrections. Mr. Stanley is no longer Commissioner, Department of Corrections.

14. The CBA does not define vacancy or lateral transfer.
15. The parties agree that lateral transfer refers to transfer of one sergeant position to another sergeant position or a corporal to another corporal position, for example.
16. On August 14, 2002, the Union filed a grievance on behalf of Sergeant David Wilson alleging, inter alia, that he was denied a lateral transfer in violation of the Article 27.17. The Union claimed that the decision was based upon an interview that should not have affected the lateral transfer and that the reasons stated in the transfer denial letter did not have any performance based issues that were ever addressed with Sergeant Wilson. (Union Exhibit C).
17. In a letter dated June 9, 2003 to the Union's representative, Lisa Currier, Human Resource Administrator for the Employer, wrote that:

...the NH Department of Corrections concurs that we do not wish an arbitration decision to possibly impact the current employee who received the lateral assignment that Mr. Wilson applied for and subsequently was not selected. The NH Department of Corrections works to ensure compliance with the Collective Bargaining Agreement and does not intentionally violate any of its provisions...What Mr. Wilson brought forward in his grievance was the fact that there has been inconsistency in the Department's approach to the selection of lateral transfers...Lateral transfers is a topic that will be brought forward to the Department's Labor Management Committee, so both labor and management can work together to resolve any issues regarding transfer selection within the Department.

(Union Exhibit D).

18. On October 8, 2003, the Union filed a grievance alleging, inter alia, that the Employer had violated the parties CBA, including Articles 27.16 and 27.17 when it posted a lieutenant's vacancy and stated that "all lateral candidates will be interviewed for this position." The Union claimed that "Article 27 clearly and unambiguously states selections for transfer shall be made on the basis of seniority within the Department of Corrections. There is no provision in the Collective Bargaining Agreement for 'Boards of Interviews' for lateral transfers." (Union Exhibit F).
19. The Union pursued two other grievances against the Employer alleging violations of Articles 27.16 and 27.17, among other provisions, on October 23, 2003 and October 30, 2003, respectively. (Union Exhibits H and I).
20. On June 9, 1998, Arbitrator Allan McCausland issued an award to the parties in which he sustained a grievance filed by the Union relative to the swap of positions by

two employees. He found that the "swap" violated the Transfer section of the CBA (at the time section 27.21, but since renumbered to the current 27.17). He wrote, in pertinent part, "the language in the Transfers section clearly gives the expectation that a very strong preference in the selection process will be given to Departmental seniority. However, it is not unequivocal. Requiring reasons for non-selection by seniority within the same Section implies that seniority will not be the absolute determinate here in all cases." (Union Exhibit G).

21. During sub-unit negotiations on September 15, 2003, the Employer proposed amending the language of Article 27.16 to include the provision "[p]ostings shall also indicate whether or not an interview will be required for lateral candidates" as well as changes to Article 27.17. (Union Exhibit J).
22. The topic of lateral transfers, and the procedures utilized by the Department, has been regularly discussed during the course of labor-management meetings between the parties during the period March 2001 through September 2003. (Union Exhibits K through V). The Union has consistently expressed its position to the Department that all vacancies must be posted and filled by seniority in accordance with the CBA.
23. There is no reference within Article 27.16 or Article 27.17 to the conducting of interviews as part of the selection process.
24. In response to a first step grievance filed on behalf of CO James Vanetten, Major Dan Shaw determined that interviews were not part of the process for the filling of lateral transfers under the contract and therefore advised a unit manager to stop conducting them. (See Union Exhibit Y).
25. Lisa Currier ("Currier") is the Department's Human Resource Administrator and has held this position since 1994. She testified that all vacant positions are posted as long as they are funded, and that the Department will not fill a vacancy that is unfunded, but will instead reassign an employee or employees if there is an operational need. In the event of a reassignment, there is no posting because there is no vacancy. According to Currier, the "appointing authority" determines if there will be interviews conducted for a particular vacancy, and acknowledged that interviews have not always been used, and that their use has been inconsistent.

### ORDER

#### JURISDICTION

The Union's complaint alleges that the State has violated RSA 273-A:5 I (e), (g) and (h). Pursuant to RSA 273-A:6 I, the PELRB has primary jurisdiction of all alleged violations of RSA 273-A:5. *Appeal of State Employees Association of New Hampshire, Inc.*, 139 N.H. 441, 444 (1995).

## DECISION

The State's motion to dismiss based upon the Union's alleged violation of the six (6) month statute of limitations, under RSA 273-A:6, VII, is denied. The Union's motion to strike the State's amended answer is also denied. Furthermore, the Union's unfair labor practice complaint is dismissed. There is insufficient evidence in the record that the State has refused to negotiate in good faith in violation RSA 273-A:5 I (e). Moreover, based upon the fact that the parties' CBA contains a grievance procedure that includes final and binding arbitration, we dismiss the Union's claim under RSA 273-A:5 I (h). Since no other statutory or rule violation has been established, the Union's claim under RSA 273-A:5 I (g) is also dismissed.

## DISCUSSION

We first address the procedural issues presented before us. The State requests that the Union's allegation in its complaint relating to an incident that occurred in June 2002 be dismissed as untimely. While it is true, pursuant to RSA 273-A:6, VI, that "[t]he board shall summarily dismiss any complaint of an alleged violation of RSA 273-A:5 which occurred more than six (6) months prior to the filing of the complaint...", we deny the State's request for the simple reason that there is no claim to be dismissed. It is clear from the record, specifically through the representations of Union counsel, that the Union makes no formal complaint, nor seeks any relief, regarding the June 2002 allegations, but merely offers these facts as relevant background information to the case at hand. We accept and consider such evidence for that purpose. See *Amalgamated Transit Union, Local 717 v. Manchester Transit Authority*, PELRB Decision No. 2001-064 (July 17, 2001).

Next, we deny the Union's motion to strike the State's supplemental answer. Pursuant to Pub 201.04, the board shall permit an amendment to the complaint or to the answer, upon due notice to all the parties, *at any time.* (Emphasis added). The Union had several days prior to the day of hearing in order to review the document, and effectively until December 1, 2004, the date upon which the record was closed, to provide a written response if it felt inclined to do so. Moreover, the State's pleading is supplemental in nature to its original answer, does not present any sweeping changes from its initial list of defenses, and, to the extent the State presented evidence referenced within its supplemental answer, the Union had the opportunity to conduct cross-examination, present rebuttal testimony, and/or address the alleged fact(s) in its post-hearing brief.

As to the merits of the Union's complaint, we find there to be insufficient evidence to warrant a finding of a RSA 273-A:5 I (e) violation against the State. There is no doubt that the vacancy and transfer language within the parties' CBA, and specifically Articles 27.16 and 27.17, has been a point of contention for a considerable period of time between these parties. The record reflects that the parties have met and spoken about the meaning and application of this language on many occasions since its adoption in 1997. (See Findings of Fact No. 12 and 22, above). They also went to arbitration in 1998 over a grievance involving the swapping of assignments between employees. (Finding of Fact No. 20, above). However, on the face of the record before us, we cannot conclude that the Department's actions with respect to vacancies and transfers rise to the level of bad faith bargaining or a refusal to bargain. On the contrary, the

Department's actions, if nothing else, exhibit a willingness to engage in negotiations over these subjects.

Pursuant to RSA 273-A:3, I, "the obligation to negotiate in good faith shall not compel either party to agree to a proposal or to make a concession." Thus, to the extent that the Department has a differing opinion from that of the Union as to the meaning and application of Articles 27.16 and 27.17, this does not constitute a *per se* violation of RSA 273-A:5 I (e). Despite our belief that repeated violations of the provisions of a CBA can rise to the level of bad faith bargaining, and therefore constitute a violation of RSA 273-A:5 I (e), the record before us is insufficient to reach the conclusion that such a pattern of violations has taken place. While we recognize that in 1998 the State was held by an arbitrator to have violated the language contained in Articles 27.16 and 27.17 (Finding of Fact No. 20, above), that case involved a grievance specifically relating to "swaps," and the arbitrator was not asked to determine whether the Department was failing to post *all* vacancies and lateral transfers, wrongfully conducting interviews, or otherwise failing to provide *documented* performance based reasons for non-selection. The record indicates that grievances were subsequently filed regarding these issues (Findings of Fact Nos. 16, 18 & 19, above), but there is no evidence of any being heard in arbitration.

Although we do not find a violation of RSA 273-A:5 I (e), we are sympathetic to the Union's frustration with the Department's actions. The record reflects an erratic approach to the issues at hand by the Department, which sends a confusing message to the Union. The fact that a mid-level manager determined that interviews were not part of the process for the filling of lateral transfers under the contract (Finding of Fact No. 23, above), while at the same time the Department continues to conduct them elsewhere (Findings of Fact Nos. 11, 18 & 25, above), is illustrative of this problem.

Simply stated, the instant case presents a matter of contract interpretation. The parties dispute involves the interpretation and application of Articles 27.16 and 27.17, and whether or not these contract terms have been breached. Where the parties' grievance procedure provides for final and binding arbitration, this Board does not regularly have jurisdiction to interpret the parties' CBA. *Appeal of State of New Hampshire*, 147 N.H. 106, 108 (2001). Here, the grievance procedure contained in the parties' CBA specifically provides for final and binding arbitration of disputes arising as to the interpretation or application of any provision of the agreement. (Findings of Fact Nos. 6 & 7, above). Accordingly, we direct the parties to utilize their mutually agreed upon arbitration procedures and dismiss that portion of the Union's complaint alleging a violation of RSA 273-A:5 I (h).

As the parties move forward, we also direct them to more freely exchange information as to vacancies, transfers and reassignments, and to conduct open discussions based upon such information. If they are unable to resolve any dispute that arises, the matter should be pursued through their grievance procedure, up to and including final and binding arbitration, if necessary. The parties are reminded that the failure to abide by an arbitration award can constitute an unfair labor practice. See *Board of Trustees of the University System of New Hampshire v. Keene State College Education Association*, 126 N.H. 339, 341, 342 (1985).

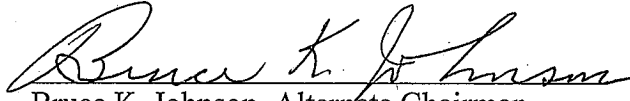


Having otherwise found no statutory or rule violations, we also conclude that no violation RSA 273-A:5 I (g) has occurred.

The Union's improper labor practice complaint is hereby DISMISSED.

So ordered.

Signed this 15<sup>th</sup> day of February, 2005.

  
Bruce K. Johnson, Alternate Chairman

By unanimous vote. Alternate Chairman Bruce K. Johnson presiding with Alternate Board Members Teresa B. Jones and Carol M. Granfield also voting.